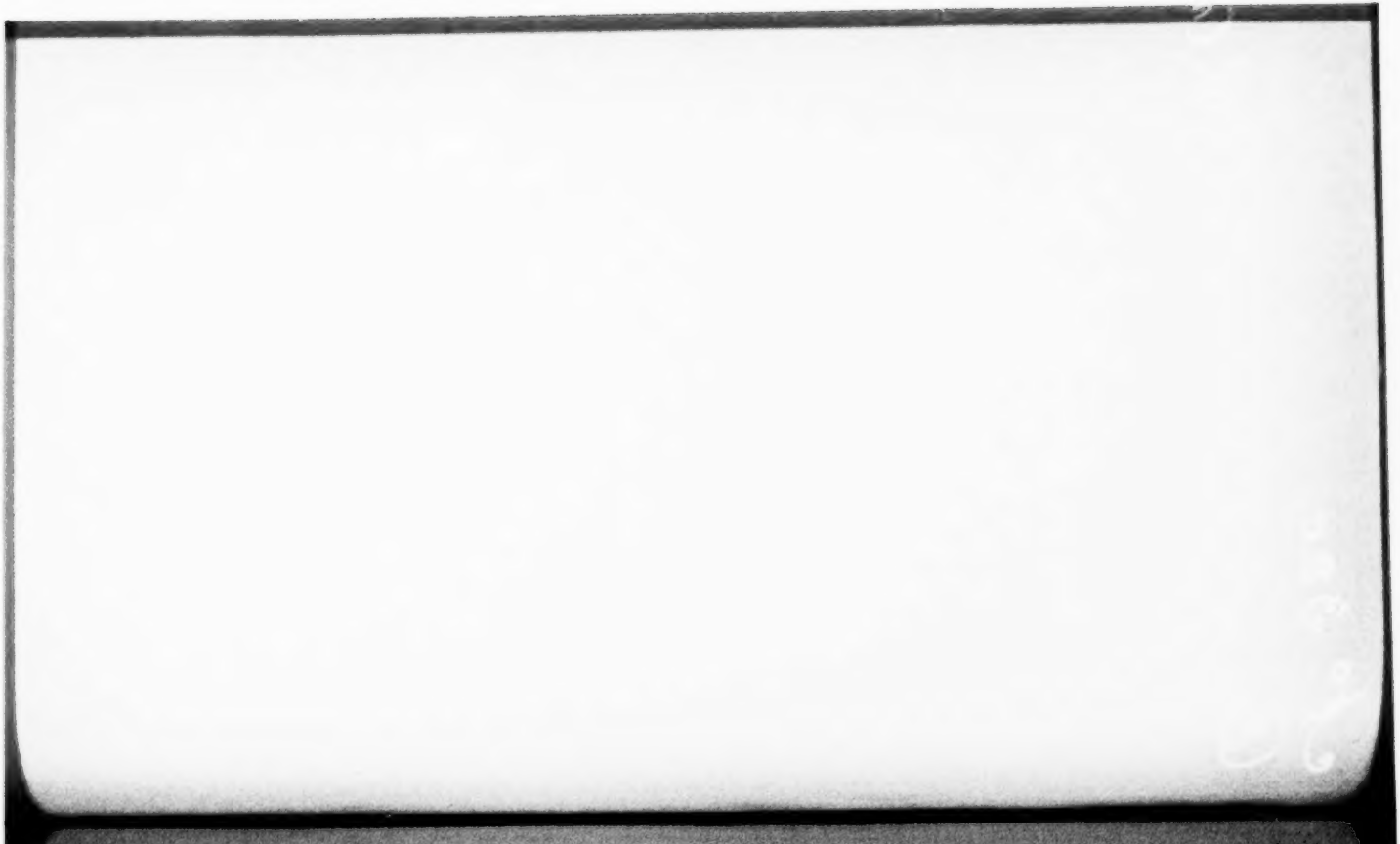

No. 320.

Brf. of M Culloh for P & Cnr

31413
Office Supreme Court U. S.
FILED
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Clerk.

Supreme Court of the United States.

Filed June 4, 1902.

OCTOBER TERM, 1901.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff in Error,

versus

CECIL BROWN, as Administrator of the Estate of David B. Smith, deceased,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Motion of Defendant in Error to Dismiss and Affirm.

Brief of Plaintiff in Error in Opposition to Motion.

ALLAN McCULLOH,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

31414

IN THE

Supreme Court of the United States.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Plaintiff-in-Error,

VERSUS

CECIL BROWN, Administrator of the Estate of David B. Smith, deceased.
Defendant-in-Error.

Brief of Plaintiff-in-Error on Motion to Dismiss.

This is an action on a policy of insurance for $25,000 upon the life of David B. Smith, deceased, and is brought up from the Supreme Court of the Territory of Hawaii by writ of error. The action was commenced by an administrator of the estate of the assured, to whom letters were issued by the Circuit Court of the First Circuit of Hawaii. The defendant-in-error now moves to dismiss the writ, upon the ground that the assignment of errors presents no federal question for the consideration of the Court, and that the alleged errors assigned are frivolous. He also moves for an affirmance of the judgment below, upon the ground that, although the record may show jurisdiction, the

proceedings by writ of error were taken only for the purpose of delay.

The record shows the following facts: The Equitable Life Assurance Society, plaintiff-in-error, which wrote the policy in suit, is a New York corporation, organized and doing business under the laws of that State, and having its principal office there in the City of New York. The policy was written December 7, 1897, and by its terms the company agreed, on receipt of satisfactory proofs of the death of the assured, providing the policy should then be in force, to pay the sum of $25,000 to the assured's executors, administrators or assigns, at the company's office in the City of New York. The assured was a resident of the Territory of Hawaii, and died there intestate December 24, 1899. The policy at the time of the assured's death was in his possession in Hawaii, and came into the possession of defendant-in-error, as the assured's administrator in that Territory. Proof of death was furnished under the policy, and defendant-in-error commenced this action against the company to recover the sum insured. Before the commencement of this action, administrators of the assured's estate were also appointed by the Surrogate's Court of the County of New York, in the State of New York, and the New York administrators have also brought suit against the company, plaintiff-in-error, upon the policy, in the Circuit Court of the United States for the Southern District of New York.

The present action came on for trial in the Hawaiian Territorial Court. The trial judge refused to admit in evidence proof of the appointment of the New York administrators, or of the commencement by them of suit upon the policy in the Circuit Court for the Southern District of New York. To these rulings due exception was taken by plaintiff-in-error. As a result of this trial, defendant-in-error obtained a verdict and judgment for the full amount of the insurance money, and this judgment was on appeal affirmed by the Territorial Supreme Court.

The errors assigned are:

FIRST: That at the time of the trial of this action in the Territory of Hawaii, another action was pending against plaintiff-in-error upon the same policy in the United States Circuit Court for the Southern District of New York, brought by permanent administrators duly appointed by the Surrogates' Court of the County of New York, a duly exemplified copy of which said proceedings in New York is set out in and made a part of the record upon which the judgment of the Supreme Court of Hawaii was rendered.

SECOND. Because of the exclusion as evidence of the exemplified copy of the proceedings upon the appointment of the New York administrators, and the exclusion as evidence of the exemplified copy of the proceedings in the suit brought by them in the United States Circuit Court for the Southern District of New York; all of said exemplified copies having been offered in evidence for the purpose of maintaining that judgment ought not to be entered against the Company, because of the proceedings in New York, and because Section 1, Article IV. of the Constitution of the United States, providing that full faith and credit shall be given in each State to the public acts and judicial proceedings of every other State, which clause was, by Section 905 of the Revised Statutes, made effective in the Territories, required the abatement of the proceedings in the courts of Hawaii, and all of said exemplified copies being offered under claims of exemption from liability to the Hawaiian administrator by virtue of the constitutional and statutory provisions, and of the Act of Congress entitled "An Act to provide a government for the Territory of Hawaii."

ARGUMENT.

Plaintiff-in-error does not question the propriety of payment by it of the amount of the policy in suit. It has always stood ready to pay the face of the policy. But it is willing to pay it only to the person properly entitled to receive payment; and it is not willing to pay the amount of the policy twice. The questions which are presented in the present case are in many respects novel. It is by no means clear to the plaintiff-in-error that payment to the defendant-in-error would constitute any defense to the action which has already been brought upon the policy in the United States Court in New York by the New York administrators. Those administrators assert that they alone have title to the policy in suit; that the policy was assets of the decedent in the State of New York; that by the grant of letters to them and the bringing of suit upon the policy in that jurisdiction it has been reduced to their exclusive possession, and that they alone are entitled to bring suit upon it. If this position, in support of which strong grounds are certainly to be urged, should be sustained, it is evident that payment to defendant-in-error would afford no protection to the insurance company in the suit pending in New York. If, as the New York administrators assert, the issuance of letters to them in that State and the commencement of suit upon the policy in that jurisdiction by them constituted an exclusive appropriation of the policy by them, it is clear that those proceedings were applicable as a bar to the present suit, and that the refusal of the trial Court in Hawaii to admit exemplified copies of those proceedings in evidence in the action there was error, and was a refusal to give faith and credit to judicial proceedings in New York.

Upon the novel and important questions of law which are thus raised, plaintiff in error submits that it is entitled to a decision from this tribunal. It is not unheard of for a debtor to be compelled to pay his

debt twice over by judicial proceedings in two jurisdictions.

> "If the courts of Massachusetts," says Mr. Commissioner EARL in Osgood vs. Maguire, 61 N. Y., 524, 530, "should ultimately hold that defendant is obliged also to pay these notes for the benefit of a Massachusetts creditor, there would be a conflict of jurisdiction much to be regretted. But such a consideration should not induce the courts of this State to yield their jurisdiction over property within this State which they have undertaken to administer for the benefit of all the parties interested."

In Douglass vs Phœnix Insurance Co., 138 N. Y., 209, it would seem that an insurance company was actually subjected to double payments upon the same policy of insurance in consequence of a conflict as to jurisdiction between the Courts of New York and Massachusetts.

> "We deem it unnecessary," says Chief Judge ANDREWS, at page 221 of his opinion in that case, "to consider the position of the defendant. If it may be subjected to embarrassment, or even to a double judgment, it will be in consequence of its own act in voluntarily subjecting itself to the laws of Massachusetts. The power of the court to grant a continuance in a proper case will generally afford a remedy to a party so situated. But the plaintiff ought not to be prejudiced or prevented from collecting his debt in this State."

Threatened with such a situation in the present case, it is not frivolous of plaintiff-in-error to seek from this Court a direction as to where and to whom payment of its obligation may safely be made. If title to the chose in action upon which suit has been brought is exclusively in the possession of the New York admini-

strators, payment to the Hawaiian administrator will not be such a safe payment; and if such is the situation, if the New York administrators have in fact, by virtue of certain judicial proceedings, actually obtained an exclusive title to and control of the policy of insurance in suit, the Hawaiian Courts refused to give full faith and credit to those judicial proceedings when by the rulings of the trial judge, and the decision of the territorial Supreme Court in affirmance of those rulings, they excluded proper evidence of the judicial proceedings in New York.

Defendant-in-error relies upon the case of New England Mutual Life Insurance Co. vs. Woodworth, 111 U. S., 138. It is submitted, however, that the decision of this Court in that case was by no means necessarily conclusive of the controversy presented in the case at bar. In that case, it was pointed out that claims upon policies of life insurance, being simple contract debts, are assets at the domicil of the debtor, and that the question of the physical whereabouts of the written policy is immaterial.

> "The general rule," says Mr. Justice BLATCHFORD (p. 145), "is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found."

That the physical possession of the policy has no bearing upon the question of the right to administer and recover upon it is also clear from the decision of this Court in Union Mutual Life Insurance Co. vs. Lewis, 97 U. S., 682. (See opinion of the New York Court of Appeals to the same effect, in Sulz vs. Mutual Reserve Fund Life Association, 145 N. Y., 563). In the Woodworth case, however, this Court did lay down the rule that, as a matter of convenience, an insurance company must be held to be domiciled for the purpose of administration and suit upon a policy of life insur-

ance, in any jurisdiction within which it was doing business and had an agent upon whom it had authorized process to be served. This rule, however, the Court distinctly declares is one of convenience merely. Upon this subject, Mr. Justice BLATCHFORD, in delivering the opinion of the Court, said (pp. 144, 145):

> "In the growth of this country and the expansions and ramifications of business and the free commercial intercourse between the States of the Union it has come to pass that large numbers of life and fire insurance companies and other corporations established with the accumulated capital and wealth of the richer parts of the country seek business and contracts in distant States which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of the creditors of going to distant places to bring suits on policies and contracts, and from the additional requirement in case of death of taking out letters testamentary or of administration at the original domicil of the corporation debtor in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States. * * * In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has by virtue of those laws a place of business in Illinois and a general agent there and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable on death to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there."

The rule, then, which permits a policy of life insurance like that here in suit to be regarded as assets for purposes of administration and suit, in any jurisdiction in which the defendant company is doing business, is based upon a fiction of law introduced simply for the convenience of claimants who have taken out, or are desirous of taking out, letters of administration in jurisdictions other than that of the actual domicile of the insurance company. This fiction supposes the debtor to be domiciled wherever it is doing business. It is a fiction introduced for the convenience of creditors; and there can be no reason for its employment where it does not tend to the convenience of the creditor and can be used only for the oppression of the debtor.

The rule has been invented to relieve administrators in other jurisdictions from the necessity of taking out letters at the actual domicile of the corporation. It can, therefore, have no application to the present case, where letters upon the assured's estate have been taken out both in the Territory of Hawaii and in the State of New York, the latter being the jurisdiction under the laws of which plaintiff-in-error was organized and is doing business, and within which it has its principal office and its actual domicile; within which, furthermore, at the office of the company in the City of New York, the policy in suit is by its own terms payable.

Many cases might be cited declarative of the familiar principle that, where letters have been taken out in the jurisdiction in which the debtor is domiciled, he will not be protected in case he makes payment to a foreign representative of his creditor's estate.

Chapman vs. Fish, 6 Hill, 554.
Stone vs. Scripture, 4 Lansing, 186.
Pond vs. Makepeace, 2 Metc., 114.
Maas vs. German Savings Bank, 36 Misc., 154.

"Where," says McAdam, J., for the Appellate Term of the New York Supreme Court in the latter case, "at the time of the payment by the

> debtor there is a conflicting grant of letters by the courts of this State, the authorities are unanimous that the foreign administrator is superseded and he has no power to act."

In that case the intestate lived and died in the State of New Jersey, and upon her death letters were there taken out by an administrator who had possession of her savings bank book. To him the defendant, a New York savings bank, paid over the intestate's balance of account. Letters had, however, previous to this payment, been issued in New York to another person as ancillary administrator. This fact was not known to the bank at the time it made the payment in question, but the courts of New York held that the payment to the New Jersey administrator constituted no defense to an action by the ancillary administrator in New York for the amount of the deposit in bank.

> Where an ancillary administration is had, the executor or administrator of the domicil cannot withdraw or dispose of the ancillary assets by direct or indirect means, until the ancillary administration is settled, whether debts are found in the ancillary jurisdiction or not.
>
> Du Val vs. Marshall, 30 Ark., 230.

Although payment to the Hawaiian administrator in the present case would probably have been a good discharge of the debt, had no conflicting letters been issued in New York, and that even without suit or judgment in Hawaii; yet now, it is submitted, a grave question is presented whether the plaintiff in error, if it pays the face of the policy to the Hawaiian administrator, will not be forced to make a second payment upon the same debt in New York.

If no administration had been taken out in New York and no claim had been made by the administrators in that State upon the policy, defendant-in-error could have been treated by a useful fiction as

having title to the policy in suit. That has not been the case, however. New York administrators have been appointed, and have brought suit upon the policy. Their title to it does not rest upon a rule of convenience but upon matters of fact; and when they were granted letters for the purpose of administering on this policy in the jurisdiction of its *situs*, the jurisdiction within which plaintiff-in-error was actually domiciled and within which the debt was, by the terms of the contract, payable; and when they thereafter proceeded to bring suit upon the policy, it may well be asserted that they then became vested with an exclusive title to it, and that it became assets in their hands alone. The admission in evidence of the exemplified copies of the judicial proceedings had in New York would then have displayed the fact that defendant-in-error had no title to the chose sued upon; that it was not assets in Hawaii; that it was assets in a foreign jurisdiction in the possession and under the control of ancillary administrators there appointed, with whose administration of the assets there present the Hawaiian administrator could not, directly or indirectly, interfere. The exclusion of this evidence was, then, error, and it constituted a failure to accord full faith and credit to judicial proceedings had in the Surrogates' Court of the County of New York, and in the Circuit Court of the United States for the Southern District of New York. The question of whether the exclusion was proper is a federal question, and it is not a frivolous one.

The litigation over the policy in suit has been carried on in widely-distant tribunals and at a great expense to plaintiff-in-error, whose only interest in the matter is that payment shall be made to the proper party, and that it shall not be made twice. The questions presented are novel and important. Plaintiff-in-error ventures, therefore, to express the hope that, when this appeal shall be finally decided by this Court, such decision will not be made without some expression of opinion which may serve as the basis of a rule to be

applied in future cases, and in particular in the suit now pending upon the same policy in the federal courts in New York.

The motion to dismiss the writ of error and to affirm the judgment below should be denied.

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